

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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	x	Index	
PASQUALE ROSAMILIA, et al.		Number <u>383</u>	2007
		Motion	
-against-		Date <u>July 16,</u>	2008
		Motion	
DESMOND S. LYNCH, et al.		Cal. Number <u>45</u>	
		Motion Seq. No. <u>6</u>	
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	x		

The following papers numbered 1 to 7 read on this motion by defendant Greenpoint Mortgage Funding, Inc. and defendant Mortgage Electronic Registration Systems, Inc. (MERS) s/h/a Mortgage Registration System for, inter alia, (1) summary judgment dismissing the fourth, fifth, eighth, ninth, and tenth causes of action asserted against them, (2) summary judgment dismissing the complaint against defendant MERS based on its sixth and seventh affirmative defenses, and (3) summary judgment in favor of defendant Greenpoint on its first and second counterclaims, on this cross motion by defendant Chandrawattie Dudnauth and defendant Chetram Lalchand for, inter alia, (1) summary judgment dismissing the third and ninth causes of action asserted in the complaint and (2) summary judgment on their first counterclaim, and on this cross motion by plaintiff Pasquale Rosamilia and plaintiff Dolores Sverko for (1) an order permitting them to amend their complaint and (2) summary judgment on their causes of action seeking to set aside allegedly fraudulent conveyances.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits.....	1
Notice of Cross Motion - Affidavits - Exhibits...	2-3
Answering Affidavits - Exhibits.....	4-5
Reply Affidavits.....	6-7

Upon the foregoing papers it is ordered that the motion and the cross motions are denied. (See the accompanying memorandum.)

Dated: October 6, 2008

SUPREME COURT : QUEENS COUNTY
IA PART 17

_____ x

PASQUALE ROSAMILIA, et al.

-against-

DESMOND S. LYNCH, et al.

_____ x

INDEX NO. 383/07

MOTION DATE: JULY 16, 2008

MOTION CALENDAR NO.: 45

MOTION SEQ. NO.: 6

BY: KITZES, J.

DATED: OCTOBER 6, 2008

Defendant Greenpoint Mortgage Funding, Inc. and defendant Mortgage Electronic Registration Systems, Inc. (MERS) s/h/a Mortgage Registration System have moved for, inter alia, (1) summary judgment dismissing the fourth, fifth, eighth, ninth, and tenth causes of action asserted against them, (2) summary judgment dismissing the complaint against defendant MERS based on its sixth and seventh affirmative defenses, and (3) summary judgment in favor of defendant Greenpoint on its first and second counterclaims. Defendant Chandrawattie Dudnauth and defendant Chetram Lalchand have cross-moved for, inter alia, (1) summary judgment dismissing the third and ninth causes of action asserted in the complaint and (2) summary judgment on their first counterclaim. Plaintiff Pasquale Rosamilia and plaintiff

Dolores Sverko have cross-moved for (1) an order permitting them to amend their complaint and (2) summary judgment on their causes of action seeking to set aside allegedly fraudulent conveyances.

On or about November 20, 2002, defendant DLE South Ozone Park Corp. conveyed premises (a two-family home) known as 119-18 144th Street, South Ozone Park, New York (the subject premises) to defendant Desmond S. Lynch, allegedly the sole owner of the defendant corporation. Defendant Lynch gave a mortgage covering the subject premises to defendant Greenpoint in the principal sum of \$184,200 dated November 20, 2002 and recorded on November 17, 2003. Defendant Lynch also gave a mortgage covering the subject premises to Baron Associates in the principal sum of \$50,000 dated June 11, 2003 and recorded on September 22, 2003. On or about November 12, 2003, defendant Lynch, at a time that the plaintiffs had brought an action against him, transferred the subject property back to defendant DLE allegedly for no consideration. Defendant DLE gave a mortgage covering the subject premises to Baron Associates in the principal sum of \$33,000 dated November 12, 2003 and recorded on March 19, 2004.

While the plaintiffs allege that the November 12, 2003 conveyance to DLE rendered Lynch insolvent, the defendants allege that Lynch owns premises known as 970 Hillman Street, West Hempstead, New York for which he paid \$165,000 and which has allegedly increased in value to \$470,000. The plaintiffs reply

that defendant Lynch had placed several mortgages against the West Hempstead property and that MERS had filed a notice of pendency against the West Hempstead property.

On or about June 18, 2003, the plaintiffs began an action against Lynch in the Supreme Court of the State of New York, County of Nassau (Rosamilia v Lynch, Index No. 9458/03). On or about July 28, 2004, the plaintiffs obtained a judgment in Nassau County against defendant Lynch in the amount of \$125,885.42. On or about September 7, 2004, the plaintiffs docketed their judgment against defendant Lynch in Queens County.

On or about October 10, 2004, defendant Chandrawattie Dudnauth and defendant Chetram Lalchand (the defendant purchasers) entered into a contract with defendant DLE for the sale of the subject premises, and the attorney for the defendant purchasers ordered a title search. The plaintiffs allege that the title report mentions the judgment they obtained against defendant Lynch and the no consideration transfer from him to DLE. Paragraph 30 of Schedule B of the title reports reads: "The following (one) judgments(s) against Desmond Lynch, a prior owner, to be satisfied and/or discharged prior to closing or same will be excepted***." The title report lists the judgment obtained by the plaintiffs for \$125,885.42. Paragraph 39 of Schedule B of the title report reads: "Deed into the certified owner herein shows no consideration. Judgments and liens against the prior owner and any

outstanding title exceptions set forth herein must be disposed of prior to closing."

The defendant purchasers applied to defendant Greenpoint for a mortgage, and they allegedly supplied the prospective mortgagee with a copy of the title report. The plaintiffs allege that defendant Greenpoint thereby received actual notice of the judgment filed against defendant Lynch and actual notice of the no consideration transfer of the subject premises to defendant DLE. The judgment was allegedly not made an exception to title insurance at the closing because it was not against DLE, the party transferring title.

On or about January 11, 2005, defendant DLE conveyed the subject premises to defendant Chandrawattie Dudnauth and defendant Chetram Lalchand for \$440,000 by deed recorded on January 27, 2005. The defendant purchasers obtained a mortgage from defendant Greenpoint in the amount of \$374,000 on January 11, 2005. The defendant purchasers used part of the proceeds from this mortgage (at least \$291,111.08) obtained from defendant Greenpoint to satisfy the three prior mortgages placed on the subject premises by defendant Lynch and defendant DLE. On June 21, 2005, the defendant purchasers obtained a home equity line of credit mortgage from Greenpoint in the amount of \$50,000 which was recorded on November 22, 2005.

On or about November 3, 2006, the plaintiffs began this action in the Supreme Court of the State of New York, County of Nassau (Index No. 18129/06), but venue was transferred to Queens County pursuant to a decision and order (one paper) dated February 14, 2007. The fourth and fifth causes of action allege that defendant Greenpoint and defendant MERS, an assignee, conspired with other defendants to defraud the plaintiffs in their collection of the judgment against defendant Lynch. The eighth and ninth causes of action seek to set aside conveyances from defendant Lynch to defendant DLE and from defendant DLE to the defendant purchasers as fraudulent, and the tenth cause of action seeks to set aside the assignment of the mortgage from defendant Greenpoint to defendant MERS.

Debtor and Creditor Law § 273, "Conveyances by insolvent," provides: "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." (See, Cadle Co. v Organes Enterprises, Inc., 29 AD3d 927; Citibank, N.A. v Plagakis, 8 AD3d 604; Grace Plaza of Great Neck, Inc. v Heitzler, 2 AD3d 780; St. Teresa's Nursing Home v Vuksanovich, 268 AD2d 421.)

Debtor and Creditor Law § 273-a, "Conveyances by defendants," provides: "Every conveyance made without fair

consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment." (See, National Enterprises, Inc. v Clermont Farm Corp., 46 AD3d 1180; Fischer v Sadov Realty Corp., 34 AD3d 632.) A party seeking to set aside a conveyance as fraudulent under Debtor and Creditor Law § 273-a need not establish insolvency or fraudulent intent. (See, Schoenberg v Schoenberg, 113 Misc 2d 356, modified on other grounds and affirmed 90 AD2d 827; Republic Ins. Co. v. Levy, 69 Misc 2d 450; Carmody-Wait 2d, NY Prac with Forms § 85:43.) Moreover, a judgment creditor seeking to set aside a conveyance as fraudulent under Debtor and Creditor Law § 273-a need not show that he has futilely resorted to other proceedings to enforce the judgment. (See, Roth v Porush, 281 AD2d 612; Republic Ins. Co. v. Levy, supra; Carmody-Wait 2d, NY Prac with Forms § 85:43.)

Debtor and Creditor Law § 278, "Rights of creditors whose claims have matured," provides in relevant part: "Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title

immediately or mediately from such a purchaser, a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or b. Disregard the conveyance and attach or levy execution upon the property conveyed." (Emphasis added.) (See, Skiff-Murray v Murray, 17 AD3d 807; Roth v Porush, supra.)

Real Property Law § 266, "Rights of purchaser or incumbrancer for valuable consideration protected," provides: "This article does not in any manner affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." (See, Fischer v Sadov Realty Corp, supra; Karan v Hoskins, 22 AD3d 638.)

That branch of the plaintiffs' cross motion which is for an order pursuant to CPLR 3025(b) permitting them to serve an amended complaint is denied. In determining whether to permit a party to amend a complaint to add a cause of action, the court must examine the merits of the proposed cause of action. (See, Morgan v Prospect Park Associates Holdings, LP, 251 AD2d 306; McKiernan v McKiernan, 207 AD2d 825.) In the case at bar, the plaintiffs failed to adequately demonstrate that the proposed changes to their complaint have merit.

That branch of the plaintiffs' cross motion which is for summary judgment on their causes of action based on Debtor and

Creditor Law §§ 273 and 273-a is denied. Summary judgment is not warranted where there is a genuine issue of fact which must be tried. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) The conflicting evidence in the record concerning whether the conveyance from defendant Lynch to defendant DLE on November 12, 2003 rendered the former insolvent has created an issue of fact which precludes summary judgment under Debtor and Creditor Law § 273. (See, Madison Hudson Associates LLC v Neumann, 4 AD3d 257.) While there are no genuine issues of fact concerning whether the conveyance from Lynch to DLE on November 12, 2003 was fraudulent pursuant to Debtor and Creditor Law § 273-a, having been made without fair consideration at a time when Lynch was a defendant in an action brought against him by the plaintiffs, the judgment not being satisfied and insolvency not being relevant (see, Blakeslee v Rabinor, 182 AD2d 390; Schoenberg v Schoenberg, supra; Republic Ins. Co. v Levy, supra), summary judgment setting aside the conveyance made to the defendant purchasers and the mortgages given to defendant Greenpoint is precluded by an issue of fact arising under Debtor and Creditor Law § 278, i.e., whether the defendants were "without knowledge of the fraud" at the time that they acquired their interests. (See, Skiff-Murray v Murray, supra.) It is true that a purchaser is "chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed***." (Anderson v Blood, 152 NY 285, 293; see,

Fischer v Sadov Realty Corp., supra; Miner v Edwards, 221 AD2d 934.) Although the title report mentioned the judgment against Lynch and the transfer for no consideration, the title insurer eventually deleted the judgment as an exception to coverage, and, under all of the circumstances, conflicting inferences may be drawn concerning whether the defendant purchasers and defendant mortgagee are chargeable with knowledge of the fraudulent transfer made by Lynch. "It is well settled that where the facts permit conflicting inferences to be drawn, summary judgment must be denied***." (Morris v Lenox Hill Hospital, 232 AD2d 184, 185, affd 90 NY2d 953; Myers v Fir Cab Corp., 64 NY2d 806.)

That branch of the cross motion by defendant Dudnauth and defendant Lalchand which is for summary judgment dismissing the plaintiffs' third cause of action is denied. The third cause of action seeks damages for the defendant purchasers' alleged role in the alleged fraudulent conveyance. A court may impose a personal judgment against a party instead of setting aside a fraudulent conveyance. (See, Constitution Realty, LLC v Oltarsh, 309 AD2d 714.) Moreover, a creditor has a remedy for money damages against "parties who participate in the fraudulent transfer of a debtor's property and are transferees of the assets and beneficiaries of the conveyance." (Stochastic Decisions v DiDomenico, 995 F2d 1158, 1172, citing Federal Deposit Ins. Corp.

v Porco, 75 NY2d 840, 842; see, Constitution Realty, LLC v Oltarsh, supra.)

That branch of the cross motion by defendant Dudnauth and defendant Lalchand which is for summary judgment dismissing the plaintiffs' ninth cause of action is denied. There is an issue of fact concerning whether the defendant purchasers were "without knowledge of the fraud" at the time that they acquired their interests. (See, Skiff-Murray v Murray, supra.)

That branch of the cross motion by defendant Dudnauth and defendant Lalchand which is for summary judgment on their first counterclaim is denied. There is an issue of fact concerning whether the defendant purchasers were "without knowledge of the fraud" at the time that they acquired their interests. (See, Skiff-Murray v Murray, supra.)

Those branches of the motion by defendant Greenpoint and defendant MERS which are for summary judgment dismissing the fourth and fifth causes of action asserted against them are denied. (See, Constitution Realty, LLC v Oltarsh, supra; Stochastic Decisions v DiDomenico, supra.)

Those branches of the motion by defendant Greenpoint and defendant MERS which are for summary judgment dismissing the eighth, ninth, and tenth causes of action are denied. (See, Skiff-Murray v Murray, supra.)

Those branches of the motion by defendant Greenpoint and defendant MERS which are for summary judgment dismissing the complaint against them pursuant to their sixth and seventh affirmative defenses are denied. These affirmative defenses are based on the doctrine of equitable subrogation. The buyers used most of the proceeds from the purchase money mortgage given by defendant Greenpoint to satisfy mortgages placed on the subject premises by defendant Lynch and defendant DLE from November 20, 2002 to November 12, 2003. "Where,***the funds of a mortgagee are used to discharge a prior lien upon the property of another, the doctrine of equitable subrogation applies to prevent unjust enrichment by subrogating the mortgagee to the position of the senior lienholder***." (Great Eastern Bank v Chang, 227 AD2d 589, 589; see, Wagner v Maenza, 223 AD2d 640.) While the doctrine is used to adjust the priorities among creditors, defendant Greenpoint cited no authority for the proposition that the doctrine is a defense to an action to set aside a fraudulent conveyance. The priorities among creditors can be determined after a fraudulent conveyance is set aside.

That branch of the motion by defendant Greenpoint and defendant MERS which is for summary judgment on their first and second counterclaims is denied. The court notes that the application of the doctrine of equitable subrogation depends on the equities of the case, and, for example, it will not be applied

where the mortgagee seeking subrogation knew of the pre-existing lien. (See, R.C.P.S. Associates v Karam Developers, 238 AD2d 492.) The doctrine of equitable subrogation may be invoked "where the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance." (King v Pelkofski, 20 NY2d 326, 333-334; see, Bank One v Mui, 38 AD3d 809; R.C.P.S. Associates v Karam Developers, supra.) The doctrine of equitable subrogation has also not been applied in favor of third parties who purchased property that was subject to a judgment creditor's lien where there were facts which should have led the third parties and their title insurance company to conduct further inquiry regarding an alleged fraudulent conveyance of the property from a judgment debtor to his wife from whom they purchased the property. (See, Roth v Porush, supra.) In the case at bar, the plaintiffs have alleged that defendant Greenpoint received a title report which should have put it on notice of the fraudulent conveyance, and, under all of the circumstances of this case, there are issues of fact pertaining to the application of the doctrine of equitable subrogation.

The remaining branches of the motion and cross motions
are denied.

Short form order signed herewith.

J.S.C.